UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANON U.S.A., INC. and CANON FINANCIAL SERVICES, INC.,

Plaintiffs,

-against-

DIVINIUM TECHNOLOGIES, INC., formerly known as EZ DOCS, INC. d/b/a OFFICE AUTOMATION SYSTEMS and d/b/a VISTA DIGITAL SOLUTIONS, ANTHONY J. GRIMALDI, STEVEN HERNANDEZ, CATHERINE MATTIUCCI, LEONARD J. HARAC, JAY J. FREIREICH and BRACH EICHLER LLC,

Defendants.

Case No. 15-cv-01804-PAC

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD BY DEFENDANTS JAY J. FREIREICH AND BRACH EICHLER LLC ON THE BASIS OF PRIVILEGE

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PRELIMINARY STATEMENT

Plaintiffs Canon U.S.A., Inc. ("Canon USA") and Canon Financial Services, Inc. ("CFS") (together, "Plaintiffs") respectfully submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 37(a), to compel defendants Jay J. Freireich ("Freireich") and his law firm, Brach Eichler LLC ("BE") (collectively, the "BE Defendants"), to produce approximately 300 responsive documents that they have withheld from production on the basis of the attorney-client privilege and/or the work product doctrine.

The BE Defendants would have this Court believe that they are asserting privilege on behalf and for the benefit of their former clients, defendants Anthony Grimaldi ("Grimaldi") and Steven Hernandez ("Hernandez"), a pair of inveterate con artists with extensive criminal records against whom defaults have been entered in this action following their failure to appear. But that is not true. Grimaldi and Hernandez have chosen not to defend themselves and have not directed the assertion of any privilege on their behalf. Rather, the BE Defendants are seeking to assert privileges purportedly possessed by their former clients to protect *themselves*. Specifically, the BE Defendants seek to conceal critical evidence supporting Plaintiffs' allegations that they aided and abetted the massive fraud that their former clients perpetrated upon Plaintiffs, business equipment leasing companies, and dozens of business equipment end-user customers.

The vehicle for the commission of this fraud was an entity formed by Grimaldi and Hernandez named EZ Docs, Inc. ("EZ Docs"), which also was represented by the BE Defendants. Evidence of the legal services provided by the BE Defendants to Grimaldi and Hernandez relating to EZ Docs, and the communications between the BE Defendants and their former clients concerning EZ Docs, will be highly probative of Plaintiffs' claims against the BE Defendants. Such evidence will reflect both the BE Defendants' knowledge and understanding of the fraud, and the manner in which the BE Defendants materially aided and abetted that fraud.

The BE Defendants' assertion of privilege on behalf of their former clients is demonstrably improper, and cannot shield the withheld documents, for several reasons.

First, Grimaldi and Hernandez have demonstrated, beyond reasonable dispute, that they have no interest in or intention of defending themselves in this or any other civil lawsuit. Neither responded to the complaint in this action, nor objected to the entry of defaults against them. In fact, over the last several years, Grimaldi and Hernandez have allowed numerous default judgments to be entered against them in lawsuits arising from their fraudulent activities at EZ Docs and elsewhere. It is readily apparent that neither intends to act to protect their interests, including by asserting any privilege, and, accordingly, they have waived any privilege with respect to the documents being withheld by the BE Defendants.

Second, the withheld documents should be produced under the crime-fraud exception to the asserted privileges. The evidence is overwhelming that Grimaldi and Hernandez operated EZ Docs as a criminal enterprise to commit fraud and other crimes, and that they used legal services furnished by the BE Defendants in furtherance of their misdeeds.

Third, the BE Defendants' withholding of documents on the basis of the work product doctrine perverts the salutary purposes of that doctrine. The BE Defendants cite the work product doctrine *not* to shield documents prepared in anticipation of or in connection with *this* litigation, but instead to conceal documents prepared in connection with *other*, *concluded actions* in which the BE Defendants represented Grimaldi, Hernandez and/or EZ Docs, and where the BE Defendants' own interests were *not* at stake. These documents clearly do not properly qualify for work product protection in this action. But, even if they did, they still should be produced because (i) the BE Defendants implicitly waived such protection by putting the documents' contents at issue in defending against Plaintiffs' claims, and (ii) Plaintiffs have demonstrated a substantial need for the documents because they are central to Plaintiffs' contention that the BE Defendants knowingly aided and abetted their former clients' fraud and other illegal conduct.

Accordingly, the BE Defendants should be ordered to produce all documents currently withheld on the basis of the attorney-client privilege and/or work product doctrine. Alternatively, Plaintiffs request that the Court undertake an *in camera* review of such documents to determine whether any can be properly withheld.

FACTUAL BACKGROUND

I. Plaintiffs' Businesses

Plaintiff Canon USA is the exclusive United States distributor of Canon-brand products, including Canon-brand business equipment (*i.e.*, copiers, high-speed printers and the like). Canon USA markets Canon-brand business equipment primarily through a nationwide network of independent, authorized retail dealers. Such dealers purchase equipment from Canon USA, and then market it to end-user customers. Dealers also provide maintenance and repair services and sell consumable supplies (such as toner (*i.e.*, ink)) for business equipment to their customers.[1]

Because business equipment generally is expensive, end-users usually choose to lease it, rather than to purchase it. Numerous business equipment leasing companies offer leasing services to business equipment end-user customers. One such leasing company is plaintiff CFS, which is a wholly-owned subsidiary of Canon USA. Leasing companies such as CFS purchase title to units of business equipment from retail dealers, and then lease the machines to end-user customers for time periods specified in written lease agreements.[2]

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[1] *See* the Complaint in this action ("Complaint") ¶¶ 18-23.
[2] *See* Complaint ¶¶ 24-27.

II. Freireich Assisted Grimaldi and Hernandez in Structuring EZ Docs to Defraud Canon USA

Defendants Grimaldi and Hernandez had significant criminal records unrelated to the business equipment industry before they met about a decade ago.[3] They became literal partners in crime while working for a business equipment retail dealer unaffiliated with Plaintiffs, and then started their own business equipment enterprise after being fired for misconduct.[4]

While their plans for their business were in the formative stage, Grimaldi and Hernandez were arrested and indicted in 2007 on felony and other charges arising from a fraudulent business equipment leasing transaction (they later copped pleas to lesser charges).[5] Eventually focusing their plans upon acquiring an authorized Canon business equipment retail dealership to use as a vehicle for illegal schemes, Grimaldi and Hernandez tried to acquire a small authorized Canon retail dealership named Office Automation Systems ("OAS") in 2008.[6] But, after learning of the duo's 2007 arrests and other troubling information about them, Canon USA refused to provide its requisite approval for their acquisition of OAS.[7]

Undeterred, Grimaldi and Hernandez rededicated themselves to finding a way to acquire OAS, even if it meant defrauding Canon USA in the process. They enlisted Grimaldi's sister, defendant Catherine Mattiucci ("Mattiucci"), to falsely pose as a business equipment industry veteran interested in acquiring OAS. A phony biography was concocted for Mattiucci, and her connection to Grimaldi and Hernandez was deliberately concealed from Canon USA. The fraud succeeded. Canon USA approved Mattiucci's ostensible acquisition of OAS in November 2008.[8]

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[3] *See* Declaration of Robert G. Manson submitted in support of this motion ("Manson Dec."), ¶ 2 and Ex. 1; *see also* Complaint ¶¶ 28-29.

[4] *See* Manson Dec. ¶ 3 and Ex. 2; *see also* Complaint ¶¶ 30-34.

[5] *See* Manson Dec. ¶¶ 1, 4 and Exs. 1, 3; *see also* Complaint ¶¶ 35-36.

[6] *See* Manson Dec. ¶ 5 and Ex. 4; *see also* Complaint ¶ 44.

[7] *See* Manson Dec. ¶¶ 4, 6 and Exs. 3, 5; *see also* Complaint ¶ 46.

Grimaldi and Hernandez retained attorney Freireich (who had not yet joined BE) to provide legal services. EZ Docs was formed in 2008 to assume ownership of the dealership. Aware that Grimaldi and Hernandez were the true principals and owners of EZ Docs, but that Mattiucci had to be so designated in order to continue to deceive Canon USA regarding the company's ownership and control, Freireich prepared a tri-partite agreement amongst Grimaldi, Hernandez and Mattiucci, the sole purpose of which was to facilitate his clients' fraud upon Canon USA (the "Option to Purchase Stock Agreement"). Pursuant to that agreement, Mattiucci became the nominal owner of 100% of EZ Docs' stock to hide the identities of the real owners. Grimaldi and Hernandez were granted options to purchase the stock for a *de minimis* sum equal to about one percent (1%) of the amount they paid to acquire OAS.[9]

III. The BE Defendants Assisted Grimaldi and Hernandez in Furthering EZ Docs' Ability to Defraud Leasing Companies and End-User Customers

In late 2009, Grimaldi and Hernandez set their sights on acquiring a larger dealership that, unlike OAS, was authorized to purchase and resell more expensive models of Canon-brand business equipment. That dealership, Vista Digital Solutions, Inc. ("Vista"), could only be acquired with Canon USA's approval. To secure such approval, Grimaldi and Hernandez again had Mattiucci hold herself out to Canon USA as EZ Docs' sole principal and owner, continuing to conceal their ownership, operation and control of the company.[10]

[8] *See* Manson Dec. ¶¶ 7, 8, 9 and Exs. 6, 7, 8; *see also* Complaint ¶¶ 47-52.

[9] *See* Manson Dec. ¶¶ 10 and Ex. 9; *see also* Complaint ¶¶ 53-54. Mattiucci asserted in the sworn affidavit she submitted in the 2011 lawsuit commenced by EZ Docs against Canon USA that the purchase price paid for OAS was $900,000.00. *See* Manson Dec. ¶ 31 and Ex. 30; *see also* Complaint ¶ 52.

[10] *See* Manson Dec. ¶¶ 11, 12 and Exs. 10, 11; *see also* Complaint ¶¶ 56-62.

Grimaldi and Hernandez turned to attorney Freireich, and later BE (after Freireich became a partner of BE in March 2010), to represent EZ Docs with respect to its acquisition of Vista. The BE Defendants were careful to maintain the fiction that Mattiucci was EZ Docs' sole principal and owner while negotiating the acquisition and preparing the necessary documents. After obtaining Canon USA's approval and engaging in lengthy negotiations, EZ Docs' acquisition of Vista closed in August 2010.[11]

IV. EZ Docs' Fraud and Other Illegal Conduct upon Business Equipment Leasing Companies and End-User Customers

Grimaldi and Hernandez used EZ Docs to commit massive fraud and other crimes, enriching themselves at the expense of business equipment leasing companies (such as CFS) and end-user customers. Their primary fraudulent scam involved leases for business equipment.

Essentially, EZ Docs identified end-user customers having business equipment under lease and approached them with a "too good to be true" offer to "trade in" their existing equipment for new equipment. EZ Docs promised to pay off the remaining obligations under the customer's existing lease(s), and to return such equipment to the leasing company holding title to it. But, after the customer's old equipment was removed and new equipment installed (and after EZ Docs had pocketed the full purchase price for the new equipment), the customer discovered that: (i) EZ Docs had failed to pay off the lease(s) for the "traded in" equipment; (ii) the customer remained responsible for the lease payments for the "traded-in" equipment (along with accrued interest and penalties), in addition to the lease payments for the new equipment; and (iii) the "traded in" equipment had not been returned to the leasing company holding title to it, and instead, had disappeared.[12]

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[11] *See* Manson Dec. ¶ 13 and Ex. 12; *see also* Complaint ¶¶ 63-64.
[12] *See* Complaint ¶¶ 65-83.

Dozens of end-user customers were victimized by this scam.[13] In some cases, EZ Docs went beyond merely making promises it never intended to keep, and added forgery and the fabrication of documents to the arsenal of illegalities employed to dupe leasing companies and customers.[14] The full extent of EZ Docs' illegal activities may never be known, but it is clear that the crimes committed by Grimaldi, Hernandez and EZ Docs caused many millions of dollars in losses to Plaintiffs, various business equipment leasing companies, and scores of customers.

V. The BE Defendants Assisted Grimaldi and Hernandez in Maintaining Their Continuing Fraud upon Canon USA

In 2011, as customer complaints regarding EZ Docs mounted and customers began to pursue litigation against the company, Mattiucci apparently became concerned that her role as EZ Docs' ostensible sole owner and principal could expose her to liability. Grimaldi and Hernandez consulted the BE Defendants, who, in turn, devised a solution to keep Mattiucci in place as EZ Docs' puppet principal while addressing her liability concerns.

Freireich prepared another tri-partite agreement amongst Grimaldi, Hernandez and Mattiucci in October 2011 (the "Nominee Declaration"). That agreement (i) recited that EZ Docs' stock "was originally capitalized by" Grimaldi and Hernandez; (ii) acknowledged that "Canon was and is unwilling to permit [Grimaldi and Hernandez] to have an ownership interest in a Canon licensed dealership;" (iii) further acknowledged that Grimaldi and Hernandez were intended to be co-owners of EZ Docs; (iv) recited that Mattiucci "has acted as nominee for [Grimaldi] and [Hernandez]" in holding ownership of EZ Docs' stock; (v) provided that Grimaldi and Hernandez would indemnify Mattiucci for any liability arising from their conduct;

[13] *See* Manson Dec. ¶¶ 15-22 and Exs. 14-21. As reflected in the Complaint, the evidence submitted in support of this motion (which is intended to provide the Court with a sampling of the evidence regarding the defendants' fraud and other illegal conduct) is only the tip of the iceberg with respect to the evidence in Plaintiffs' possession substantiating that dozens of end-user customers were victimized by this scam. *See* Complaint ¶¶ 84-155.

[14] *See* Manson Dec.¶¶ 23-27 and Exs. 22-26; *see also* Complaint ¶¶ 127-42.

and (vi) further provided that in exchange for such indemnification, Mattiucci would transfer ownership of Grimaldi's or Hernandez's shares of EZ Docs' stock to them at any time, upon their request.[15]

VI. EZ Docs' Termination by Canon USA and Its Efforts to Be Reinstated, Assisted by the BE Defendants

By October 2011, Canon USA determined that Grimaldi and Hernandez were working for EZ Docs, and suspected that they were the actual principals of the company. This discovery, combined with EZ Docs' poor performance and misdeeds leading to a spate of customer complaints, caused Canon USA to terminate EZ Docs' authorized Canon retail dealership in late October 2011.[16]

Cut-off from legitimately holding itself out as an authorized Canon retail dealer and purchasing new Canon-brand business equipment with which to perpetrate its scams, EZ Docs, represented by the BE Defendants, sued Canon USA to obtain an injunction reinstating its authorized Canon retail dealership.[17]

In seeking an injunction, EZ Docs again needed to convey the illusion that Mattiucci was its sole owner and principal. Accordingly, in support of EZ Docs' threshold motion for preliminary injunctive relief, the BE Defendants prepared an affidavit for Mattiucci which was knowingly and deliberately false and perjurious. In that affidavit, Mattiucci asserted that: (i) she was the "sole owner" of EZ Docs, and that "[n]o other person has ever held any equity interest in [EZ Docs];" (ii) she was the "sole officer" of EZ Docs; (iii) "[i]n August 2010, I purchased the assets of [Vista]," fraudulently suggesting that she actually controlled EZ Docs; (iv) Grimaldi and Hernandez performed management functions at EZ Docs solely to cover for Mattiucci when she needed to "lessen [her] work load" because of her daughter's health problems; and (v) "[t]here has been no deception" of Canon USA with respect to Grimaldi's role with EZ Docs.[18]

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[15] *See* Manson Dec. ¶ 29 and Ex. 28; *see also* Complaint ¶ 161.
[16] *See* Complaint ¶ 162.
[17] *See* Manson Dec. ¶¶ 30 and Ex. 29; *see also* Complaint ¶ 163-64.

The New York County Supreme Court denied EZ Docs' motion for preliminary injunctive relief, thereby effectively ending EZ Docs' bid to remain an authorized Canon retail dealer. EZ Docs eventually abandoned the lawsuit in 2012.[19] The BE Defendants apparently ceased representing Grimaldi, Hernandez and EZ Docs some time in 2012.[20]

VII. Mattiucci's Lawsuit Against the BE Defendants

In March 2014, Mattiucci commenced a lawsuit against the BE Defendants, alleging legal malpractice. In her complaint, Mattiucci admitted that she and others conspired to defraud Canon USA, and she attached a July 2011 letter signed by attorney Freireich, stating (contrary to the sworn affidavit that Freireich prepared for Mattiucci in November 2011) that Grimaldi and Hernandez were EZ Docs' "de facto shareholders, officers and directors."[21] Mattiucci further asserted that, while ostensibly serving as her counsel (as well as counsel to Grimaldi, Hernandez and EZ Docs), the BE Defendants compromised her interests in favor of the interests of Grimaldi and Hernandez.[22]

The BE Defendants successfully moved to dismiss Mattiucci's malpractice suit, and in doing so, admitted to having structured EZ Docs' ownership for the purpose of deceiving Canon USA.[23] While granting the BE Defendants' motion to dismiss, Justice Nancy M. Bannon of the New York County Supreme Court referenced the BE Defendants' admission, and noted that the allegations in Mattiucci's complaint pointed to the existence of a conspiracy to defraud Canon USA in which the BE Defendants participated:

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[18] *See* Manson Dec. ¶ 31 and Ex. 30; *see also* Complaint ¶ 165.
[19] *See* Complaint ¶¶ 166.
[20] In January 2013, BE sued EZ Docs, apparently seeking recovery of unpaid legal fees. However, BE quickly abandoned the lawsuit for reasons that are currently unclear. *See* Complaint ¶ 186.
[21] *See* Manson Dec., ¶ 32 and Ex. 31; *see also* Complaint ¶ 195.
[22] *See* Manson Dec. ¶ 32 and Ex. 31; *see also* Complaint ¶ 195.
[23] *See* Manson Dec. ¶ 33 and Ex. 32; *see also* Complaint ¶ 196.

> The Nominee Declaration, which [Mattiucci], Grimaldi and Hernandez signed [and which was prepared by the BE Defendants], clearly states that "Canon was and is unwilling to permit the said Anthony Grimaldi and Steven Hernandez to have any ownership interest in a Canon licensed dealership," and therefore, [Mattiucci] was acting as the nominee for Grimaldi and Hernandez so that EZ Docs could conduct business with Canon. Moreover, the Option to Purchase Stock Agreement which [Mattiucci] also signed states that [Mattiucci] owned all of the common stock shares of EZ Docs, therefore making her the sole shareholder of EZ Docs. [Although Mattiucci] now regrets agreeing to this arrangement and signing documents that clearly identify her as the shareholder, director and officer of the company, this does not constitute negligence on the part of her attorneys. To the extent that [Mattiucci] is alleging that [the BE Defendants] are liable for some failed conspiracy they participated in, this does not amount to legal malpractice, which is the only cause of action in the complaint.[24]

VIII. Grimaldi and Hernandez's Abandonment of Their Interests in This and Other Actions

Although they were served with process, neither Grimaldi nor Hernandez has made any effort to defend themselves in this action, and the Court has entered defaults against them.[25] This is consistent with Grimaldi's and Hernandez's similar conduct in other lawsuits in recent years. Hernandez has defaulted in multiple lawsuits relating to his fraudulent activities, at EZ Docs and elsewhere. Hundreds of thousands of dollars in judgments have been entered against him.[26] Similarly, Grimaldi has defaulted, both in his personal capacity and on behalf of EZ Docs (of which he became the sole owner in 2012), in numerous actions arising from his fraudulent activities, in which hundreds of thousands of dollars in judgments have been entered against him

[24] *See* Manson Dec. ¶ 34 and Ex. 33; *see also* Complaint ¶ 197.
[25] *See* ECF No. 34.
[26] *See* Manson Dec. ¶¶ 35-37.

and/or EZ Docs.[27] Beginning in early 2013, Grimaldi appears to have dodged all attempts by his counsel to contact him, and has apparently gone "underground" to avoid creditors and others.[28]

IX. Hernandez's 2015 Criminal Indictment

In 2015, the Office of the New York County District Attorney indicted Hernandez and two confederates on felony and other charges arising from fraudulent business equipment scams perpetrated subsequent to Hernandez's departure from EZ Docs.[29] Those scams appear to be essentially identical to the dozens of frauds perpetrated by Hernandez and Grimaldi at EZ Docs, as well as the scam that led to Hernandez and Grimaldi's 2007 guilty pleas.

RELEVANT PROCEDURAL HISTORY

This Court has issued defaults against EZ Docs, Grimaldi and Hernandez. Canon USA has reached agreement to resolve its claims against Mattiucci, and Mattiucci has, among other things, expressly waived privilege with respect to any documents or information in the BE Defendants' possession, custody or control.[30]

Canon USA served document requests upon the BE Defendants in July 2015, to which they initially responded on January 15, 2016. The BE Defendants' responses were accompanied by a lengthy privilege log listing hundreds of documents being withheld, either in whole or in part, on the basis of privilege. Notably, none of such documents reflects attorney-client communications involving the BE Defendants in which the BE Defendants *were the client(s)*. Instead, all of such documents were withheld on the basis of the BE Defendants' assertion of privilege on behalf of their former clients (*i.e.*, EZ Docs, Grimaldi, Hernandez and Mattiucci).

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[27] *See* Manson Dec. ¶¶ 38-40.
[28] *See* Manson Dec. ¶¶ 41-42 and Exs. 34-35.
[29] *See* Manson Dec. ¶ 43, 44 and Exs. 36, 37; *see also* Complaint ¶ 194.
[30] *See* Manson Dec. ¶ 45 and Ex. 38.

Following meet-and-confer negotiations, the BE Defendants agreed to produce what they described as the vast majority of documents listed in their privilege log, *i.e.*, those which they asserted had been withheld on the basis of privilege asserted on behalf of EZ Docs. The BE Defendants were persuaded that EZ Docs no longer exists, and, therefore, has no privilege to assert. However, the BE Defendants continue to withhold approximately 300 documents on the basis of purported privilege. Those documents are reflected in an updated privilege log which the BE Defendants served on February 12, 2016.[31]

Although not apparent from their privilege log, the BE Defendants have informed Plaintiffs that (1) all of the documents being withheld on the basis of the attorney-client privilege are being withheld for the benefit of their former clients, Grimaldi and Hernandez; and (2) all of the documents being withheld as work product are being withheld for the benefit of both their former clients and/or themselves.

ARGUMENT

The Court should order all of the approximately 300 withheld documents produced, either prior to or after conducting an *in camera* review, for the following reasons:

(1) Grimaldi and Hernandez have effectively waived the assertion of any privilege;

(2) By application of the crime-fraud exception to the attorney-client privilege, all documents withheld on the basis of a privilege purportedly asserted on behalf of Grimaldi and Hernandez (convicted fraudsters with lengthy criminal records) should be produced; and

(3) The work product doctrine does not shield any of the withheld documents from production because it does not apply and/or has been waived, and because Plaintiffs have demonstrated a substantial need for such documents.

[31] *See* Manson Dec. ¶ 46 and Ex. 39.

I. **Grimaldi and Hernandez Have Waived Assertion of Any Privilege**

This case presents an unusual scenario in which attorneys are asserting privilege on behalf of absent former clients to protect *themselves*, not their former clients. The BE Defendants have not received directions from Grimaldi or Hernandez to assert privilege on their behalf, and since both have defaulted, neither of them benefits from the assertion of privilege.

The BE Defendants bear the burden of proving that the attorney-client privilege shields the withheld documents from production, as well as the burden of demonstrating that any such privilege has not been waived. *See In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *Egiazaryan v. Zaimayev*, 290 F.R.D. 421, 428 (S.D.N.Y. 2013). The record facts conclusively demonstrate that these burdens cannot be met.

First, Grimaldi and Hernandez have not taken *any* actions to protect their interests in this lawsuit. Both were served with process, but did not respond, and defaults have been entered against them. It is obvious that Grimaldi and Hernandez do not intend to defend themselves in any manner in this case, including by the assertion of any privilege.

Indeed, Grimaldi and Hernandez have shown that they do not intend to defend their interests in *any* civil lawsuit brought against them. Both have defaulted in numerous actions in recent years, without attempting to mount a defense. In fact, Grimaldi has essentially disappeared, and has refused to communicate with attorneys formerly representing him in other actions.

Second, the BE Defendants' assertion of privilege on behalf of Grimaldi and Hernandez accomplishes nothing for their former clients. By defaulting, Grimaldi and Hernandez have already had their interests adjudicated in this action. Further assertion of privilege on their behalf may be in the interests of the BE Defendants, but achieves nothing for Grimaldi and Hernandez, who, of course, are the holders of the privilege, not the BE Defendants. *See In re*

Von Bulow, 828 F.2d 94, 100 (2d Cir. 1987); *United States v. Nunez*, No. 12 CR 778-2, 2013 WL 4407069 at *2 (S.D.N.Y. Aug. 16, 2013) (Crotty, J.).

The determination of whether privilege has been waived must be made on a case-by-case basis, taking all relevant facts and circumstances into account. *See In re Grand Jury Proceedings*, 219 F.3d at 183; *Foster v. City of New York*, No. 14 Civ. 4142, 2016 WL 524639 at *3 (S.D.N.Y. Feb. 5, 2016). It is well-established that a party may waive the assertion of privilege by failing to take certain actions to preserve the privilege, such as by failing to serve written objections to document requests, or failing to produce a privilege log. *See, e.g.*, *Huber v. Arck Credit Co.*, No. 12-CV-8175, 2016 WL 482955 at *5 (S.D.N.Y. Feb. 5, 2016) (failure to produce privilege log waived assertion of privilege); *UBS International, Inc. v. Itete Brasil Instalacoes Telefonicas Ltd.*, No. 09 Civ. 4286, 2010 WL 743371 at *3 (S.D.N.Y. Feb. 24, 2010) (failure to assert objections to document requests waived privilege). Certainly a party's deliberate failure to defend himself altogether should similarly be deemed to waive the assertion of privilege.

The attorney-client privilege "should be strictly confined within the narrowest possible limits underlying its purpose." *United States v. Goldberg & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991); *see also Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer Inc.*, No. 95 Civ. 8833, 1998 WL 957054 at *5 (S.D.N.Y. Aug. 11, 1998) (holding that "the attorney/client privilege is to be strictly construed" because "[l]iberal construction of the attorney/client privilege leads to attorneys 'pushing the envelope' . . . which puts undue hardship on the courts and can obfuscate the truth"). The continued withholding of the documents at issue would only shield the BE Defendants (not their former clients) from discovery, and, therefore, serves no legitimate purpose.

II. The Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Doctrine Abrogates the Assertion of Any Privilege on Behalf of Grimaldi and Hernandez

"'It is well-established that communications that might otherwise be protected by the attorney-client privilege [or work product doctrine] are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal [or fraudulent] conduct' because 'advice in furtherance of such goals is socially perverse . . . and the client's communications seeking such advice are not worthy of protection.'" *United States v. Nunez,* No. 12 CR 778-2, 2013 WL 4407069 at *4 (S.D.N.Y. Aug. 16, 2013) (Crotty, J.) (citation omitted). A "party seeking to invoke the crime-fraud exception must demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof." *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995).[32]

Aware that Canon USA would never do business with a company they owned or controlled, Grimaldi and Hernandez – with the assistance of the BE Defendants – devised an elaborate fraud to dupe Canon USA into believing that EZ Docs was owned and controlled by Mattiucci (not known by Canon USA to be Grimaldi's sister), and not by them. Building on the illusion created and enabled by Freireich's drafting of the Option to Purchase Agreement and Nominee Declaration, Grimaldi and Hernandez took numerous steps to instigate and perpetuate their fraud upon Canon USA. For instance, they created a phony biography for Mattiucci, which was featured in documents submitted to Canon USA for the purpose of fraudulently inducing Canon USA to approve EZ Docs' acquisitions of OAS and Vista, and went to great lengths during the tenure of EZ Docs' authorized Canon retail dealership (and thereafter when they

[32] *See also, e.g., Chevron Corp. v. Donziger,* No. 11 Civ. 0691, 2013 WL 1087236 at *25 (S.D.N.Y. March 15, 2013); *Amusement Industry, Inc. v. Stern,* 293 F.R.D. 420, 426 (S.D.N.Y. 2013).

sought to reinstate the dealership following its termination) to maintain the illusion that Mattiucci was the sole owner and principal of EZ Docs.[33]

Moreover, the evidence is overwhelming that Grimaldi and Hernandez utilized EZ Docs as a vehicle for perpetrating dozens of fraudulent scams and other crimes upon business equipment leasing companies (such as CFS) and end-user customers. In case after case, Grimaldi, Hernandez and/or others at EZ Docs under their control made false and fraudulent promises to customers that left leasing companies and/or customers on the hook for large debts that EZ Docs had agreed to pay, while Grimaldi and Hernandez pocketed large sums paid for title to new business equipment and absconded with the customer's "traded in" equipment.[34] In other instances, Grimaldi and Hernandez employed fabricated documents or forged signatures to effectuate phony transactions.[35] Similar cons resulted in their guilty pleas to criminal charges in 2007, and in Hernandez's indictment in 2015.[36] There can be no legitimate dispute that EZ Docs was operated as a criminal enterprise to effectuate Grimaldi and Hernandez's illegal schemes.

Nor can there be any serious dispute that Grimaldi and Hernandez used the BE Defendants' legal services to further their fraudulent and illegal conduct. Indeed, as the New York state court observed, the BE Defendants facilitated Grimaldi and Hernandez's deception of Canon USA by creating documents that, on their face, memorialized such deception, enabling Mattiucci to pose as EZ Doc's sole owner and principal in dealing with Canon USA when, in reality, she was the mere puppet of Grimaldi and Hernandez.[37]

The BE Defendants further represented EZ Docs, Grimaldi and Hernandez with respect to the acquisition of Vista, significantly expanding Grimaldi and Hernandez's ability to commit

[33] *See* Manson Dec. ¶¶ 7, 8, 12, 14 and Exs. 6, 7, 11, 13; *see also* Complaint ¶¶ 47-64, 156-159.
[34] *See* Manson Dec. ¶¶ 15-22 and Exs. 14-21; *see also* Complaint ¶¶ 84-155.
[35] *See* Manson Dec. ¶¶ 23-27 and Exs. 22-26; *see also* Complaint ¶¶ 127-42.
[36] *See* Manson Dec. ¶¶ 2, 4, 43 and Exs. 1, 3, 36; *see also* Complaint ¶¶ 30-36, 194.
[37] *See* Manson Dec. ¶¶ 10, 29, 34 and Exs. 9, 28, 33; *see also* Complaint ¶¶ 53, 54, 161, 196, 197.

fraud. The BE Defendants also represented EZ Docs in its lawsuit against Canon USA seeking reinstatement of its authorized Canon retail dealership, and, in the process, knowingly prepared and filed a perjurious affidavit in which Mattiucci continued to falsely maintain that she was the sole owner and principal of EZ Docs.[38] In addition, the BE Defendants represented EZ Docs, Grimaldi and Hernandez in disputes with customers (including those that resulted in litigation) arising from their fraudulent conduct.[39]

In short, EZ Docs owed its very existence to a fraud perpetrated upon Canon USA, and its business was the commission of fraud and other crimes as directed by Grimaldi and Hernandez. Consequently, the legal services provided by the BE Defendants to EZ Docs, Grimaldi and Hernandez were necessarily in furtherance of fraudulent and illegal conduct. Every communication by or between Grimaldi, Hernandez and the BE Defendants assisted Grimaldi and Hernandez's efforts to maintain their fraud upon Canon USA, and/or assisted illegal schemes victimizing leasing companies and end-user customers. Thus, every document withheld from production by the BE Defendants concerns or reflects legal advice provided in furtherance of fraud and/or other crimes.

It is difficult to imagine a more appropriate case for application of the crime-fraud exception. No legitimate legal purpose is served by extending privilege protection to documents reflecting legal advice or services used by Grimaldi and Hernandez to further their crimes. The crime-fraud exception exists precisely to abrogate privilege in circumstances like these.

Where courts determine that the crime-fraud exception negates an assertion of privilege, the production of withheld documents and information follows. *See, e.g., Amusement Industry, Inc. v. Stern*, 293 F.R.D. 420, 439-40 (S.D.N.Y. 2013) (crime-fraud exception applied with respect to communications relating to client's use of attorneys to draft and transmit documents and negotiate transactions furthering financial frauds victimizing banks and others); *Shahinian v. Tankian*, 242 F.R.D. 255, 261 (S.D.N.Y. 2007) (crime-fraud exception applied to attorney-client communications furthering client's tax fraud); *Catton v. Defense Technology Systems, Inc.*, No. 04 Civ. 6954, 2007 WL 3406928 at *2 (S.D.N.Y. Nov. 15, 2007) (crime-fraud exception applied to defendant company's communications with attorney transmitting false information for purpose of obtaining opinion letters used to further securities fraud).

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[38] *See* Manson Dec. ¶¶ 30, 31 and Exs. 29, 30; *see also* Complaint ¶¶ 163-66.
[39] *See* Manson Dec., ¶¶ 28, 38 and Ex. 27.

Grimaldi and Hernandez obtained legal services from the BE Defendants to further their fraud upon Canon USA relating to the true ownership, operation and control of EZ Docs, from the time of EZ Docs' formation in 2008 through the time of EZ Docs' unsuccessful lawsuit seeking the reinstatement of its terminated authorized Canon retail dealership in 2011. They also obtained legal services from the BE Defendants to further their operation of EZ Docs as a criminal enterprise dedicated to the commission of fraud and other illegal conduct victimizing Plaintiffs, leasing companies, and dozens of end-user customers. Accordingly, by application of the crime-fraud exception, every document being withheld by the BE Defendants on the basis of any privilege asserted on behalf of Grimaldi and/or Hernandez should be produced.

III. The Work Product Doctrine Does Not Protect the BE Defendants' Documents from Disclosure

"The purpose of the work product privilege is to protect the integrity of the adversarial process." *New York Times v. United States Department of Justice,* 101 F. Supp. 3d 310, 319 (S.D.N.Y. 2015). The doctrine is enforced "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citation omitted).

Where a party demonstrates that documents were "prepared in anticipation of litigation or for trial," the documents may be shielded from discovery as attorney work product. *See* Fed. R. Civ. P. 26(b)(3)(A). Such protection can be extended to "factual" materials gathered in anticipation of litigation, and to "opinion work product [which] reveals 'the mental impressions, conclusions, opinions or legal theories of an attorney or other representative,' [which] is entitled to greater protection than fact work product." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (citation omitted). "To be entitled to protection for opinion work product, the party asserting the privilege must show 'a real, rather than speculative, concern' that the work product will reveal counsel's thought processes 'in relation to pending or anticipated litigation.'" *Id.* at 183-84 (citation omitted). The party asserting the work product doctrine to withhold documents bears the burden of proving its application. *Id.* at 183.

As this Court has observed, "the work product doctrine is defined by 'common sense and the practicalities of litigation.'" *Bice v. Robb*, No. 07 Civ. 2214, 2010 WL 5373904 at *1 (S.D.N.Y. Dec. 22, 2010) (Crotty, J.) (citation omitted). The doctrine can be overridden, and "work product" should be produced, in appropriate circumstances.

The work product doctrine should be overridden where the party invoking it cannot demonstrate or has waived its application, and it should not shield documents from production where the party seeking disclosure demonstrates "a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *See* Fed. R. Civ. P. 26(b)(3)(A)(ii); *see also, e.g., Allied Irish Banks, P.L.C. v. Bank of America, N.A.*, 240 F.R.D. 96, 106-09 (S.D.N.Y. 2007) (ordering production of internal investigation documents where plaintiff failed to demonstrate that documents were entitled to work product protection); *Norton v. Town of Islip*, No. CV 04-3079, 2015 WL 5542543 at *3-5 (E.D.N.Y.

Sept. 18, 2015) (ordering production of memoranda drafted by attorney where conduct of party asserting doctrine demonstrated that it had been waived); *Vasquez v. City of New York*, No. 10-CV-6277, 2014 WL 6356941 at *2 (S.D.N.Y. Nov. 14, 2014) (attorney notes and memoranda reflecting witness interviews ordered produced where plaintiff demonstrated "substantial need" for their production).

The BE Defendants' withholding of documents on the basis of the work product doctrine is inconsistent with the doctrine's purpose, and improperly shields the BE Defendants *themselves*, rather than their former clients, from discovery that is critical to Plaintiffs' claims. To the extent that the doctrine is being asserted by the BE Defendants on behalf of Grimaldi and Hernandez, it has been waived, or it should be negated by reason of the crime-fraud exception (*see* pp. 13-18, *supra*). To the extent that the doctrine is being asserted by the BE Defendants on behalf of *themselves*, the doctrine's purpose to "preserve the integrity of the adversarial process" and to create a "zone of privacy" for attorneys engaged in litigation has been undermined. The BE Defendants cannot demonstrate the doctrine's applicability to the withheld documents. Moreover, even if they could (which they cannot), they have implicitly waived the doctrine's protection.

Based upon the meager descriptions in the BE Defendants' privilege log, it appears that *none* of the withheld documents has been withheld as work product created in anticipation of or in connection with this action. Instead, it appears that *all* of the documents withheld as work product were prepared in anticipation of, or in connection with, (i) lawsuits concluded years ago, in which the BE Defendants represented EZ Docs with respect to claims asserted by its end-user customers, or where the BE Defendants represented EZ Docs with respect to disputes with

Vista's former owners;[40] or (ii) the lawsuit concluded several years ago in which EZ Docs (represented by the BE Defendants) sued Canon USA seeking to overturn its termination as an authorized Canon retail dealer;[41] or (iii) potential legal actions on behalf of Grimaldi, Hernandez and/or EZ Docs (represented by the BE Defendants) which were never commenced, and will never be commenced;[42] or (iv) Mattiucci's failed legal malpractice action against the BE Defendants, concluded nearly a year ago.[43]

Consequently, with the sole exception of documents prepared in connection with the Mattiucci malpractice action against the BE Defendants, *all* of the documents being withheld on the basis of the work product doctrine were prepared by the BE Defendants while acting as attorneys for their *former clients,* rather than as *clients themselves.* Moreover, *all* of such documents, including those relating to the Mattiucci malpractice action, were created with respect to lawsuits that either are concluded, or were never commenced (and never will be).

Thus, *none* of the withheld documents can possibly reflect an attorney's "mental impressions, conclusions or legal theories" relating to Plaintiffs' claims against the BE Defendants in this action, or claims asserted in any other pending (or contemplated) action. Thus, there is no legitimate basis for the BE Defendants to claim that their "mental impressions, conclusions or legal theories" regarding claims asserted against their former clients in concluded actions should be shielded. Therefore, the BE Defendants cannot demonstrate that the withheld documents deserve work production protection.

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[40] *See* Privilege Log (Manson Dec., Ex. 39), Part One entry nos. 2, 14, 49, 51, 53, 54, 55 and Part Two entry nos. 55, 85, 88; *see also* Manson Dec. ¶¶ 38, 47-50 and Exs. 40-43.

[41] *See* Privilege Log, Part One entry no. 47 and Part Two entry nos. 86, 87, 113, 115, 116, 126, 127, 128, 129; *see also* Manson Dec. ¶¶ 30-31.

[42] *See* Privilege Log, Part One entry nos. 6, 20, 34, 56, 57, 59, 85, 95, 109, 193, 194, 213 and Part Two entry nos. 90, 105, 153, 198, 199.

[43] *See* Privilege Log, Part Two entry nos. 200, 201; *see also* Manson Dec. ¶¶ 32-34 and Ex. 33. Plaintiffs note that these privilege log entries appear to be for "files," and do not specify the individual documents contained in those "files."

Moreover, even if they could demonstrate that the work product doctrine applies (which they cannot), the BE Defendants implicitly waived its protection by placing their knowledge and intentions regarding their former clients' illegal conduct at issue. Plaintiffs allege that the BE Defendants knowingly and intentionally provided material assistance to (i) the other defendants' perpetration of fraud upon Canon USA relating to the true ownership, operation and control of EZ Docs; and (ii) the fraudulent and illegal schemes the other defendants employed at EZ Docs to victimize business equipment leasing companies and end-user customers.

The BE Defendants deny any knowledge concerning their former clients' fraud and other misconduct.[44] By so claiming, the BE Defendants have put at issue their knowledge and state of mind during the entire period of their representation of Grimaldi, Hernandez and EZ Docs. Documents relating to the lawsuits in which the BE Defendants represented these former clients likely are highly probative of the nature and extent of the BE Defendants' knowledge and understanding of their clients' fraudulent and illegal conduct. For example, the BE Defendants represented EZ Docs in lawsuits commenced by end-user customers asserting claims against EZ Docs based upon precisely the same fraudulent conduct that is at issue in this case. The BE Defendants also represented EZ Docs in its lawsuit against Canon USA in which, Plaintiffs allege, the BE Defendants prepared a false and perjurious affidavit intended to continue to preserve the fraudulent artifice that Mattiucci was the sole owner and principal of EZ Docs.

By placing their knowledge and understanding of their clients' fraud and other misconduct at issue in this action, the BE Defendants have implicitly waived work product protection for such documents. *See, e.g., Pall Corp. v. Cuno Inc.*, 268 F.R.D.167, 169-70 (E.D.N.Y. 2010) (work product protection deemed waived where defendant claimed that it acted

[44] *See* the BE Defendants' Amended Answer to the Complaint at ¶¶ 5, 161, 165, 174, 175, 252-54, 261-63, responding to Complaint ¶¶ 5, 161, 165, 174, 175, 252-54, 261-63.

in good faith at all relevant times, and withheld documents were probative of that assertion; court held that "[w]here a 'party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material capable of rebutting the assertion,' notions of unfairness are implicated that impliedly waive work product protection" (citation omitted)); *BNP Paribas v. Bank of New York Trust Co.,* No. 11 Civ. 350, 2013 WL 2434686 at *3-7 (S.D.N.Y. June 5, 2013) (defendant bank's reliance on letter issued by insurer to support its position in action put reliability and veracity of letter at issue, and emails and other documents relating to creation and issuance of letter were therefore not protected from disclosure by work product doctrine); *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie, S.C.A.*, 258 F.R.D. 95, 106-09 (S.D.N.Y. 2009) (plaintiff's claims against defendant put defendant's knowledge and intentions at issue, resulting in implied waiver of work product doctrine with respect to withheld documents that were probative of defendant's knowledge and state of mind).

Finally, the relevant facts and circumstances demonstrate a "substantial need" for Plaintiffs to access the withheld documents. The crux of Plaintiffs' claims against the BE Defendants is that the BE Defendants, through their provision of legal services, knowingly and intentionally gave material assistance to their former clients' frauds upon Plaintiffs and others. The withheld documents are certainly probative (and may well be the best evidence) of the BE Defendants' knowledge and understanding of their clients' fraud.

The BE Defendants' status as attorneys should not obstruct Plaintiffs' ability to access documents that contain key evidence. In such circumstances, there is a substantial need warranting disclosure of the documents. *See, e.g., Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie, S.C.A.*, 258 F.R.D. 95, 111 (S.D.N.Y. 2009) (plaintiff demonstrated "substantial need" for documents designated as work product that contained evidence related to "a potentially dispositive issue in the case"); *Ehrlich v. Howe*, 848 F. Supp. 482, 492-94 (S.D.N.Y. 1994) (attorney suing law firm for wrongful termination demonstrated "substantial need" for production of memorandum reflecting firm's internal meeting at which termination was discussed and decided upon).

IV. The Court May Order the *in Camera* Review of the Withheld Documents

Many, if not most, of the BE Defendants' descriptions of documents in their privilege log contain little information regarding such documents' contents. Courts have held that where a privilege log fails to set forth information about withheld documents sufficient to establish that the documents deserve privilege protection, the claimed privilege should be deemed as waived, and the documents should be produced. *See, e.g., S.E.C. v. Yorkville Advisors, LLC,* 300 F.R.D. 152, 157-68 (S.D.N.Y. 2014); *McNamee v. Clemens,* No. 09 CV 1647, 2013 WL 6572899 at *3 (E.D.N.Y. Sept. 18, 2013). Plaintiffs submit that this would be the right result here.

Alternatively, Plaintiffs urge the Court to exercise its inherent power to order an *in camera* review of the documents to the extent it deems such review necessary to rule upon this motion. *See, e.g., Great American Insurance Co. v. Castleton Commodities International LLC,* No. 15 Civ. 3976, 2015 WL 6437397 at *1 (S.D.N.Y. Oct. 15, 2015) (*in camera* review of documents utilized to rule upon cross-motions to compel documents withheld on bases of various assertions of privilege); *Lombardi v. Whitehall XII/Hubert Street, LLC,* No. 04 Civ. 6752, 2008 WL 2557419 at *1 (S.D.N.Y. June 26, 2008) (Crotty, J.) (*in camera* review ordered to determine that privilege assertions had been waived).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion to compel be granted in all respects, and that all documents being withheld from production by the BE Defendants on the basis of attorney-client privilege and/or the work product doctrine be immediately produced.

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